Nos 435 and 4 Orig.

Brief of Carlisle for Appt. & Pet

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Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 435.

JAMES NICOL, *Appellant,*
vs.
JOHN AMES, Marshal, &c., *Appellee.*

Appeal from Circuit Court, Northern District of Illinois.

No. 4, ORIGINAL.

Ex parte IN THE MATTER
of
GEORGE R. NICHOLS, *Petitioner.*

Petition for Writ of *Habeas Corpus.*

BRIEF FOR APPELLANT AND PETITIONER.

J. G. CARLISLE,
For Appellant and Petitioner.

HENRY S. ROBBINS,
Of Counsel.

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The sixth and seventh sections of the "Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, are as follows:

ADHESIVE STAMPS.

SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, *matters and things* mentioned and described in Schedule A of this Act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

And there shall also be levied, collected and paid, for and in respect to the medicines, preparations, matters and things mentioned and described in Schedule B of this Act, manufactured, sold, or removed for sale, the several taxes or sums of money set down in words or figures against the same, respectively, or otherwise specified or set forth in Schedule B of this Act.

SEC. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court.

The second clause of Schedule A, under the heading "Stamp Taxes," provides as follows:

Upon each sale, agreement of sale, or agreement to sell, any products or merchandise *at any exchange or board of trade, or other similar place*, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each

additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: *Provided*, that on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise *without a bill, memorandum, or other evidence thereof as herein required*, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, *without having the proper stamps affixed thereto*, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the Court.

In the case of Nicol (No. 435) the appellant was convicted and fined for making a sale of merchandise for present delivery to one J. H. Milne, on the Chicago Board of Trade, "without then and there making and delivering to the said James H. Wilson any bill, memorandum, agreement, or other evidence of the said sale showing the date thereof, the name of the seller, the amount of the said sale and the matter or thing to which it referred, as required by law;" and in the case of Nichols (Original No. 4) the relator was convicted and fined for making a sale of merchandise, for present delivery, to one Robert W. Roloson on the Chicago Board of Trade "without having the proper stamps affixed

to the said bill and memorandum for denoting the internal revenue tax upon the *said sale*, bill and memorandum, as required by law." In each case the party was charged with an intent to evade the provisions of the law, and in each the judgment of the Court ordered him to be committed to the county jail until the fine should be paid. In each case also the party making the sale was a member of the board and a resident of the City of Chicago, where the merchandise was then situated, and where it was to be delivered to the purchaser. It is not alleged in the information in either case that the accused party was a broker, or that he was acting for any one else in making the sale. The conclusive presumption, therefore, is that they sold their own property.

The first step to be taken in the presentation of these cases is to ascertain, if we can, what is the subject of the tax. The framers of the clause under consideration do not appear to have had a very definite idea of the particular thing upon which the tax was to be imposed, and consequently they endeavored to employ language sufficiently comprehensive to embrace everything connected with the transaction to which the tax relates. The tax is on the "*sale*, agreement of sale, *or* the agreement to sell," and the law requires that on every sale, agreement of sale or agreement to sell, made at any of the places designated, a bill, memorandum, agreement or other evidence of the transaction shall be made and delivered by the seller to the buyer, to which there shall be affixed a lawful stamp or stamps "in value equal to the amount of the *tax on such sale*." Is this a tax on the sale, and therefore a tax on the property, measured by its value as ascertained and fixed by the parties to the sale, or a duty on the privilege to make sales of products or merchandise at exchanges, boards of trade or other similar places, or is it a duty on the business or occupation or on consumption, or on the document used as evidence in the transaction?

The Circuit Court, in its opinion, delivered on the application of Nicol for a writ of *habeas corpus*, held that this was neither a tax on the sale nor on the business, occupation or document, but a tax on the privilege of making a sale "under special and exceptional conditions," and that it was an indirect or excise tax subject to the constitutional rule of uniformity, and was uniform because it applied to all sales, agreements of sale, or agreements to sell made at exchanges, boards of trade or other similar places wherever they might be located. On these points the Court said:

The sale referred to in this statute, being a sale of products or merchandise, must be made on an "exchange or board of trade" or at a "similar place," and the seller operating for the time being at such place or market must pay the tax. Dominion over the means of making a transfer or sale on a market which is known and established and provided with special safeguards and in a sense exclusive, rather than dominion over the thing sold for the mere purpose of alienation in general, is the subject-matter of the tax. The privilege of selling upon an exchange or board of trade may be thought of as distinct from the product or merchandise there sold or from a sale—merely as a sale—there made. This privilege is itself a property or thing of value, and it is upon the privilege of selling "at any exchange or board of trade" whenever such privilege is made use of, and not upon the sale apart from the privilege, or upon the occupation or business of selling apart from the privilege, or upon the product sold, or upon the price received for it, that the tax is levied. This tax is paid by means of a stamp or stamps put on a written document required by the law to identify each transaction and to receive said stamp or stamps. The document is merely an instrumentality for collecting the tax. The tax, as said, is not in reality and legal effect upon the document, or upon the commodity sold, or upon the sale *per se*, or upon the occupation of selling, but upon the privilege of selling products or merchandise at an exchange or upon a board of trade, for, apart from this privilege, there is in the particular law here complained of no tax.

The privilege in question is taxed according to the

use made of it. The tax is graduated in proportion to the magnitude of the deal or operation. On every occasion when the privilege is used the owner thereof, himself conducting the sale, pays the tax. If he sell for some one not a member of the exchange or board of trade he will still pay the tax, even though he collect the amount, or some portion of it, from his patron as a charge incidental to the service rendered, for while the privilege taxed is his own property, the patron or employer enjoys to some extent the benefit resulting from the use of the privilege, but this tax amounts in reality to an expense in transferring commodities from the producer to the ultimate consumer. The latter, in the last analysis, foots the bill; the tax is absorbed in the ultimate cost, and the consumer eventually pays it. Therefore this tax, being a case of what may be called indirect taxation, is, as contended by petitioner, subject to the constitutional limitation of uniformity "throughout the United States," but this tax, in my judgment, falls within the rule of uniformity. That rule is met if a tax operates equally upon the specified subject matter wherever and whenever found throughout the United States. It is for the law-making power to determine the incidence of taxation—that is, upon what matters the tax shall be levied—as well as to provide the means or instrumentalities whereby the tax shall be collected. The tax in question applies whenever and wherever throughout the United States the privilege of selling products or merchandise on an exchange or board of trade or similar place is exercised, and it is graduated, as said, according to the use made of the privilege. That such a privilege is taxable seems to me plainly the teaching of the text books on taxation, nor do I understand that this proposition is or will be disputed by the learned counsel for this petitioner.

What is the privilege upon which this tax is supposed to be laid? If it is the privilege stated by the Court, it is precisely the same privilege that every man has to transact business in his own house or in his own office, under such regulations as he may chose to make. The Board of Trade of the City of Chicago is a private corporation, but the privilege of buying and selling merchandise is not conferred upon

the corporation or upon its members by the act of the Legislature. The corporation as such neither buys nor sells. By the act of incorporation it is expressly provided that "said corporation shall have no power or authority to do or carry on any business, excepting such as is usual in the *management* of boards of trade or chambers of commerce, or as provided in the foregoing sections of this bill," Sec. 12. The powers conferred by the preceding sections of the act all relate to the election of officers, the admission and expulsion of members, the appointment of committees and other matters pertaining to the government and control of the corporate affairs. The power to carry on the business of buying and selling merchandise or other property is not mentioned in the act nor is it included by implication in any of the powers granted; and besides, the tax is not imposed upon the corporation, but upon the persons who make sales or have sales made at the place controlled by the corporation. Nor is the tax exacted from those only who sell at an incorporated exchange, board of trade, or other similar place. It must be paid on account of all sales made at "any" exchange, board of trade, or other similar place, although it may be an unincorported voluntary association of individuals carrying on the business of buying and selling products or merchandise, in a building or at a place owned and controlled by themselves exclusively. Many exchanges, boards of trade and "other similar places" belong to this latter class, and they are all included in the sweeping provisions of the statute.

Moreover, the payment of the tax is not limited to sales, agreements of sale, or agreements to sell made by members of exchanges, boards of trade, or other similar places, for or on their own account, but is exacted from every producer or owner of property for whom a sale, agreement of sale, or agreement to sell is made there, whether he be a member or not.

It requires no argument to show that neither the members nor other persons derive their right or privilege to buy and sell merchandise from an act of incorporation or any other statute, or that the exercise of this right or privilege is not dependent to any extent upon a legislative grant. But it is contended that the privilege, or the opportunity—for there is no exclusive privilege—of the citizen to sell his products at a particular place, or to have them sold by a particular individual, or class of individuals, is a substantial thing that may be taxed, and is in fact taxed in this instance. It may be a benefit to the owner of goods to sell them or have them sold at an exchange or board of trade, just as it is a benefit to sell them or have them sold in a town or city where purchasers are numerous and the markets are known rather than in the country where the demand is limited and the markets not regularly established; but in neither case can it be properly said that there is such a privilege as to constitute a property or thing susceptible of identification and valuation, and subject to taxation by the United States. Any owner of property may have it sold at an exchange or board of trade if he chooses, and his right or privilege to have it so sold is in no respect different in its nature or in its use from his right or privilege to have it sold in any other market.

If a tax or duty can be imposed upon such a right or privilege, a new field for the exercise of the powers of taxation has been discovered, which political economists and legislators have not yet explored, and in cases of emergency we may expect hereafter to see all the commercial and industrial facilities of the people put under contribution for the support of the government. But we do not think the act is fairly susceptible of such a construction. A duty of twenty dollars is imposed by the second section of the act upon the privilege or occupation of commercial brokers, and they are defined as persons or firms "whose business it is as

brokers to negotiate sales or purchases of goods, wares, produce, or merchandise, &c." By another clause a duty of ten cents is imposed upon every broker's "note, or memorandum of sale of any goods or merchandise, &c." It thus appears that, independently of the clause in controversy, the act imposes a duty on the privilege or occupation and a duty on the document, and it is not to be presumed, in the absence of a plain provision to that effect, that Congress intended to impose another charge upon either the one or the other. It seems to us that there is as much reason for insisting that the stamp duty of ten cents on a broker's note or memorandum is a duty on the privilege as there is to insist that the duty imposed in these cases is on the privilege, because, although the value of the thing sold does not in one instance affect the amount of the duty, the privilege of making the sale, if it be a privilege, is of the same nature in both; that is, the owner of the property has the benefit of the broker's experience and of his facilities for reaching the market.

In the case of the "Succession Tax" Scholey *vs.* Rew, 23 Wall., 331, this Court held that the tax was not upon the land, or upon the estate in the land, but "upon the right to become the successor of real estate upon the death of the predecessor, whether the devolution or disposition of the same is effected by will, deed or laws of descent, from whom the interest of the successor has been or shall be derived"; and again, the Court said that the subject matter of the assessment was "the devolution of the estate, or the right to become beneficially entitled to the same, or the income thereof in possession or expectancy." In a very recent case, Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 283, involving the constitutionality of a State legacy and inheritance tax law, the Court said: "The right to take property by devise or descent is the creation of the law, and not

a natural right—a privilege, and, therefore, the authority *which confers it* may impose conditions upon it." And in the case of Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., on page 578, this Court, in commenting on the case of Scholey *vs.* Rew, said that "the distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the Court," an intimation, as we understand it, that if that point had been considered the validity of a tax laid by the United States on successions might not have been sustained. But however this may be, the right or privilege held to be taxable in that case was one created by law, and not a mere benefit or advantage secured by the skill or enterprise of the owner of property. It was a tax on the privilege of acquiring property by the mere operation of law, or by a mode of transmission authorized and prescribed by law, while this, if it is a tax on a privilege, as held by the Court below, is upon the privilege of the citizen to dispose of his own property at a particular place, a thing which he has a right to do independently of any legislation.

There is no doubt that the several States have the power, within certain limitations, to impose taxes upon such corporate and other granted franchises and privileges as constitute property rights, but we are not aware of any case, State or federal, in which it has been held that the mere privilege or opportunity to sell property, or to have it sold, at a particular place, is a subject for taxation. It is in fact a mere option belonging to every member of the community to sell his goods, or to have them sold, in an established market, and if it is taxable upon the ground that "it may be thought of as distinct from the product or merchandise there sold or from a sale—merely as a sale—there made," then the privilege of selling in a city having a certain number of inhabitants, or in a market where a certain amount of business is

done, or any similar option or privilege, may also be taxed by the United States or by the State.

But it will be argued that a member of an exchange, board of trade, "or other similar place," possesses a privilege "in a sense exclusive," as said by the Court below, and that such a privilege is taxable and has been taxed under the law we are considering. It cannot be seriously claimed that there is an exclusive privilege conferred by law, or otherwise acquired, to buy and sell products or merchandise generally, nor to buy and sell any particular kind of product or merchandise, but simply a privilege, which any one may secure, to buy and sell at a particular place—a place which belongs to the member and his associates and is rightfully in their possession and under their control. The privilege, or opportunity, is acquired simply by associating himself with others, and becoming, in common with them, the owner or temporary proprietor of the place where his private business, or a part of it, is transacted. It is not conferred by law, and it cannot be taken away by law. The repeal of the charter of the Board of Trade of the City of Chicago, while it would affect the organization in other respects, would not affect this privilege in the least. The members could lawfully continue to carry on the business of buying and selling at the same place, and no one else could carry on business there without their consent. The privilege is, therefore, in no respect different from that of an attorney to transact business in his own office or of a merchant to buy and sell at his own store.

Membership of an exchange, board of trade or other similar place is not an occupation or profession, and if it were, it is not claimed that this is a tax upon the occupation or profession.

Taxes upon corporate franchises or privileges are not laid upon the right or privilege to do business, but upon the right to be bodies corporate, and it would seem from numerous expressions in opinions of this Court that such a tax can be imposed only

by the authority that created them. In Home Ins. Co. *vs.* New York, 134 U. S., 594, the Court thus defined a taxable corporate franchise or privilege:

"By the term 'corporate franchise or privilege,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial purposes) the right or privilege given by the State to two or more persons of *being a corporation*, that is, of doing business in a *corporate capacity*, and not the privilege or franchise which, when incorporated, the company may exercise. * * * It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person, with a succession of members, without dissolution or suspension of business, and with a limited individual liability." See also Horn Silver Mining Company *vs.* New York, 143 U. S., 305. A tax imposed *eo nomine* upon this franchise or privilege does not necessarily become a tax upon the corporate property or business, simply because the amount of its capital stock or the amount of business transacted, is made the basis of the valuation of the franchise or privilege; but a tax on capital stock as such is a tax on the property in which it is invested, and a tax on the gains and profits derived from the use or sale of property, or a tax on gross receipts from sales, is equivalent to a tax on the property itself, as we think is now conclusively established by the decisions of this Court. Now, the individual members of exchanges, boards of trade and other similar places, enjoy none of the franchises of a body politic; they transact their business in their individual names and upon their individual responsibilities in the same way precisely as the same kind of business is transacted by those who are not members of such organizations, and the mere fact that they enjoy special facilities, created by themselves, does not endow them with a taxable franchise or privilege. If a privilege is taxed under the clause we are con-

sidering it must be decided what particular or special privilege it is. It must be, according to the view of the Court below, not merely the opportunity to buy and sell at a particular place, but the privilege of being a member of an exchange, board of trade, or other similar place, because the opportunity to buy and sell there in person is only an incident or result of the membership; it is, in other words, the advantage or benefit secured by reason of the membership.

The Court below says: "Dominion over the means of making a transfer or sale on a market which is known and established and provided with special safeguards, and in a sense exclusive, rather than dominion over the thing sold for the same purpose of alieniation in general, *is the subject of the tax.*" It will be seen at once that this definition of the thing taxed applies only to sales made by members of the organization, because they are the only persons who have dominion over the means of making transfer or sale on that market. But under the law the non-member who sells his products or merchandise, or who has them sold there, and who has no such dominion as that described, is required to pay the same tax or duty as a member. What is the thing taxed in his case? While the definition given by the Court is not sufficiently comprehensive to include all the features of the law, it nevertheless embraces the cases of the parties to the particular transactions involved in these proceedings, and shows that in the opinion of the Court, although not expressed in direct terms, the tax is imposed upon the privilege of being a member, because, as already stated, it is membership alone that confers the dominion over the means of transfer or sale.

Does the right to be a member of such association, whether incorporated or unincorporated, constitute a franchise or privilege taxable by the United States? If so, do such rights constitute a distinct group or class of franchises or privileges which may be separated from all others, and subjected to

excise taxation as a distinct group or class? Not only must these questions be answered in the affirmative in order to sustain the view taken by the Court below, but it must also be determined that it was the purpose of the law to tax the privilege and not the sale or the consumption, or the occupation or business, or the written evidence of the sale or agreement. If such was the purpose it is impossible to understand why the tax was not imposed upon the *entire* privilege including the right to buy, instead of being limited to that part of the privilege which is exercised in making sales, agreements of sale, or agreements to sell "products or merchandise." Moreover, bonds, stocks and choses in action of various kinds are daily bought and sold at exchanges and similar places, by the same persons who buy and sell products and merchandise, and in buying and selling the bonds, stocks, and other choses in action, they exercise precisely the same privilege and enjoy precisely the same advantages as when they buy and sell products or merchandise; and yet no duty is imposed on account of the sales or agreements in one case while an onerous tribute is exacted from the producer or owner in the other. But we will have occasion to refer to this feature of the law hereafter, and mention it now only because it conduces to show that it was not the intention of Congress to impose the duty on the privilege, but on the sales of particular kinds of commodities.

This tax is paid by the owner of the property no matter whether he is or is not a member of an exchange, board of trade, or other similar place, and it is not, as was erroneously assumed by the Court below, shifted to the purchaser and ultimately paid by the consumer. If all sales, or agreements of sales, or agreements to sell products or merchandise, wherever made, or all evidences of such sales or agreements, wherever made, were subject to a tax or duty, at the same rates, the tax or duty might be included in the price of the article and ultimately be

paid by the consumer; but when only such sales or agreements, or the written evidence of such sales or agreements as are made at particular places in the country, are subjected to the tax or duty, the open market in which untaxed sales and agreements are made fixes the prices of the articles, and the seller in the taxed market must lose what he pays. And this rule is inexorable and invariable when, as in the present case, only a small proportion of the products or merchandise in the country is sold in the market where the tax or duty is exacted.

This is a tax, therefore, which directly affects the value of the property in the hands of the owner, who is not the consumer but the seller, and is a charge on the property simply because it is sold, or contracted to be sold, at a particular place, and not merely a duty on the privilege or on the business or occupation, or on the bill or memorandum.

In Le Loup *vs.* Port of Mobile, 127 U. S., 645, this Court said, "Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing business is surely a tax on the business"; and in Melton *vs.* Missouri, 91 U. S., 279, it was said: "Where the business or occupation consists in the sale of goods, the license tax required is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods or indirectly from them through the license to the dealer; but if such a tax conflict with any power vested in Congress by the constitution of the United States, it will not be any less invalid because enforced through the power of a personal license." In Philadelphia Steamship Co. *vs.* Pennsylvania, 122 U. S., 326, it was contended in the argument that a tax on gross receipts was a tax on the franchise or privilege, but the Court held that it was a tax on the business of carrying on interstate commerce. The Court referred to and approved the decision in The

State Freight Tax Case, 82 U. S., 232, and said: "A tax upon fare and freights received for transportation is virtually a tax upon the transportation itself." In Fargo *vs.* Michigan, 121 U. S., 230, it was decided that a tax on gross receipts for carrying freight and passengers in or out of the State, or through the State, was a tax on the commerce from which the receipts were realized. The fact that these cases, and many others affirming the same rule, involved questions concerning the power of the States to regulate or interfere with interstate commerce, does not in any manner affect their application to this controversy, because in each of them, the first question necessarily was—upon what particular thing has the tax been laid? And in determining this question the phraseology of the law is not controlling. The Court will always ascertain if possible upon what particular thing the charge actually falls, and in doing so, it will, if necessary, disregard the verbiage of the law and reject all legislative devices to conceal the real nature and purpose of the tax. As the Court said in Robbins *vs.* Shelby Co., 120 U. S., 487: "The mere calling the business of a drummer a privilege does not make it so." In the present instance, however, as already stated, the statute does not purport to impose a duty upon the franchise or privilege, but expressly lays a tax upon the "sale, agreement of sale, or agreement to sell." If this is a tax on the sale, measured by the value of the thing sold, it is a tax on the property, and is therefore direct and subject to the rule of apportionment. Instead of requiring a formal official assessment, as is sometimes the case, or a sworn list or return, as was required in the case of the income tax law, the value of the property is ascertained in the present instance by reference to the amount for which it is sold, and it is taxed on that amount every time it is sold. "Bouvier defines assessment to be determining the value of a man's property or occupation for the purpose of levying a

tax." People *vs.* Weaver, 100 U. S., 539. In the absence of constitutional restrictions, the government which has the right to impose the tax, may adopt any method of assessment, or valuation it chooses, provided it is uniform among the classes to which it applies, and in this case it has chosen to adopt the valuation placed upon the property by the parties to the sale, and to make that the sole basis of the taxation.

The manner in which the tax is required to be paid does not affect its character in the least. If the act of August 28, 1894, which required every person of lawful age having an annual income exceeding a certain amount to make a verified list or return, had provided that the tax of two per cent. on the sum in excess of four thousand dollars should be paid by affixing an adhesive stamp to the list or return, would the character of the tax have been altered by such a provision? Would it have been converted from a direct tax on the property from which the income was derived, into an excise duty on the privilege of earning it, or on the occupations of the people, or on the document signed and sworn to by the taxpayer? Such a question requires no discussion. The method of payment or collection is a mere matter of convenience and detail, and may be varied from time to time without changing either the nature or the rate of the tax or duty. Formerly the duty on distilled spirits, malt liquors and other articles of consumption were paid directly to the collectors in money upon reports of the quantities manufactured and sold, but in 1868 the law was so changed as to require the payments to be made by affixing stamps, but it was never supposed that the real nature of the duties was altered by this legislation.

Another clause of Schedule A imposes a duty on the document, evidencing the sale, as follows:

"Contracts—Broker's note, or memorandum of sale of any *goods or merchandise*, stocks, bonds, exchange, notes of hand, real estate, or property of

any kind or description, issued by brokers or persons *acting as such*, for each note or memorandum of sale, not otherwise provided for in this act, ten cents." This clause does not require the broker or other person acting as such to make a note or memorandum of the sale, but simply imposes the duty if a note or memorandum is voluntarily made in the course of the business. Bills or memoranda of sales made by brokers and others acting as such are otherwise provided for in the act, if the tax or duty in controversy is imposed on the bill or memorandum and not on the sale or consumption or on the privilege, occupation or business. What we mean to say is, that if the duty under both clauses is imposed on the document only, both duties cannot be exacted, because they impose different rates and apply to documents executed under different circumstances; but if the tax or duty in controversy is imposed on the sale or on the privilege, or on consumption, or the business or occupation, it is evident that both may be collected—the tax of ten cents on the bill or memorandum under the clause last quoted, because the sale or agreement to sell was made by a broker or person acting as such, and another tax or duty, under the other clause, of one cent on such hundred dollars worth of products or merchandise sold or agreed to be sold on account of the sale, or on account of the privilege, or on account of the occupation or business, because the sale or agreement was made at an exchange, board of trade or other similar place. It should be observed also in this connection that the tax or duty in question, while it applies of course to the sales and agreements made by brokers and others acting as such, if made at any of the places specified in the act, extends beyond that class of sellers, and embraces all sales and agreements made personally by the producers and subsequent owners of products or merchandise if made at such places. It does not therefore purport to be a tax on the privilege, oc-

cupation or business of brokers or others acting as such, nor does it, by its terms, purport to be a tax on documents used by brokers or others acting as such, but appears to be a tax on the sale regulated by the value of the property sold, and in order to facilitate the collection of the tax on the sale or agreement the law expressly requires the seller, under a severe penalty, to make a written bill or memorandum of the transaction and affix a stamp to it "in value equal in amount to the tax on such sale." It is not to be presumed that Congress has attempted to compel the citizen to create something merely for the purpose of taxing it, but surely that is just what has been attempted if the tax is on the bill or memorandum.

The official construction of the law is that both the taxes or duties to which we have referred must be paid in all cases where the sale or agreement is made by a broker at an exchange, board of trade or other similar place, and that the one cent on each one hundred dollars' worth of products or merchandise sold is a tax on the sale to be paid by the owner of the property. This ruling was promulgated on the 5th day of November, 1898, and is as follows:

"That in case of a broker who is a member of the Board of Trade negotiating a sale of grain or produce on the Exchange as a broker for a principal, the principal afterwards assuming the trade, the broker is required to deliver and pay a ten-cent tax on his note or memorandum of sale, and the principal is required to pay a tax *on the sale* at the rate of one cent on each $100 of the amount or fractional part of $100 in excess of $100."

There are, therefore, two separate and distinct taxes or duties imposed upon different things, but both connected with the same transaction. First, a tax of ten cents on the note or memorandum of the sale or agreement made by the broker or person acting as such; and secondly, the tax on the sale regulated by the value of the thing sold. If the tax is really

imposed on the sale, the official construction that both payments must be made, is undoubtedly correct, but if it is on the document the construction is clearly incorrect, because it imposes double taxation. Cooley on Taxation, 227.

The cases bearing upon the question of direct and indirect taxation have been so recently collated and reviewed by this Court that we do not consider it necessary to cite them in detail. In Pollock *vs.* Farmers' Loan and Trust Company, 157 U. S., 427, a majority of the Court, after a careful examination of the authorities, decided that a tax on the rents, issues and profits of real estate was a tax on the real estate, but there was an equal division of opinion on the question whether the tax or duty imposed by the Act of August 28, 1894, on the incomes derived from other sources, conformed to the rule of uniformity, and consequently there was no decision on that point. In the course of the opinion it was said, " We admit that it may not unreasonably be said that logically, if taxes on the rents, issues and profits of real estate are equivalent to taxes on real estate, and are, therefore, direct taxes, taxes on the income of personal property as such are equivalent to taxes on such property, and therefore direct taxes." And upon the rehearing of the case, 158 U. S., 601, after a re-examination of the judicial and historical authorities, it was expressly held that " taxes on personal property, or on the income of personal property, are likewise direct taxes." On the first hearing the Court said, " Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes." 157 U. S., 558. In the case of Maine *vs.* Grand Trunk, 142 U. S., 217, decided in 1891, the Court, speaking of excise taxes, said: " The desig-

nation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular functions. It is used more frequently in the latter sense than in any other." While these definitions may not be strictly adhered to since the recent thorough re-examination of the subject in the light of the practice and understanding at the time the constitution was adopted, still we suppose it cannot be disputed that duties uniformly laid on all articles of consumption of the same kind, and primarily paid before the articles reach the consumer, are indirect taxes or excises, because their amount can ordinarily be included in the price and shifted to the last purchaser, who is not compelled to pay them unless he chooses to buy and use the articles; but we think it is clear that taxes imposed upon a part only of the articles of the same kind, though they are articles of consumption, and which the owner is required to pay as a condition upon which he is allowed to sell his property, are direct taxes, because they are a charge upon the property which the owner is compelled to pay, and they cannot be added to the price and be ultimately paid by the consumer. Such taxes are paid primarily and finally by the owner at the time he parts with his property, and are not taxes on consumption. The right of the producer or subsequent owner of property to sell it or have it sold at an exchange, board of trade or other similar place, is just as perfect as his right to sell or have it sold anywhere else, and therefore, when it is declared by law that he shall neither sell it himself nor have it sold at such places without the payment of a tax on its value, it is a condition imposed upon his right of alienation which makes the payment of the tax compulsory upon him. "The power of alienation of property is a necessary incident to the right of

property." 2 Kent, 326. Certainly no man is compelled by law to so use his real or personal property, or to so invest his money, as to make it yield an income, but he has a right to do so and must do so or deprive himself of a large part of the value of his possessions. Nor is the owner of produce or merchandise actually compelled by law to sell it at an exchange, board of trade or other similar place, but he has a right to do so, and he has the same reason for doing so that any other owner of property has for making a profitable use of his lands, goods or money.

In determining the character of this tax, the Court must consider the effect of the whole law under which it is imposed, in order to see how the taxpayer and his property are affected. Whether the burden of a particular tax can or cannot be shifted, is a question of fact, dependent upon the practical operation of the law in each case. It requires no extraneous evidence, however, to satisfy a court that if the same article is taxed when produced or sold at one place and not taxed when produced or sold at another place in the same locality or market, the owner can not possibly charge the amount of the tax to the purchaser. An attempt to do so would terminate his business at once, and this, in our opinion, is the very result which this clause of the statute was intended to accomplish.

The cases in which this Court has held that a tax on sales, or a tax on the privilege to make sales, or on the occupation of selling, or on the proceeds of sales, or on the gains and profits realized from sales, or on the receipts from a business, is equivalent to a tax on the thing sold or on the business transacted, are so numerous that it would be tedious to review them. Beginning with Brown *vs.* Maryland, 12 Wheat., 419, and ending with Pollock *vs.* Farmers' Loan and Trust Co., 158 U. S., 601, the Court has considered these questions in nearly all their aspects and in

their application to a great variety of circumstances, and its judgments, especially in the Income Tax Cases, are conclusive that, if this is a tax on sales based upon the value of the property sold, it is equivalent to a tax on the property itself, and is a direct tax within the meaning of the constitution. Surely if a tax on the income—the gains and profits—derived from the use or sale of personal property, is direct, a tax on the entire proceeds of a sale of such property must also be direct. The reasoning of the Court in the two cases last referred to and the conclusions reached necessarily include such taxes in the class of direct taxes, when they are imposed according to the value of the thing sold. This is not a specific tax or duty on articles of consumption, but a tax on sales or agreements to sell "any products or merchandise," whatever may be their character, made at an exchange, board of trade or other similar place, and the amount of the tax in every instance depends entirely upon the value of the products or merchandise sold or agreed to be sold. In the case of Hylton *vs.* United States, 3 Dall., 171, a specific tax was imposed upon carriages varying in amount according to their character, not according to their value, and it was held to be a duty and not a direct tax, but upon what distinct ground the decision was based it is difficult to determine from the report. The case was altogether unlike the present in another respect—the tax was required to be paid only by the owner of carriages kept for use or hire, not by every owner through whose hands it might pass in the course of trade.

It is not necessary in order to make a tax direct within the meaning of the constitution that it should be imposod on all the property of all the people, nor that all the particular kinds of property taxed should actually exist in all the States; and we are therefore unable to appreciate the force of the argument concerning apportionment, which so largely influenced the

judgment of Mr. Justice Iredell in the Hylton case. Under the constitution it is the whole tax—the whole sum to be raised—that is to be apportioned "according to the census or enumeration," and it is not required to be apportioned upon or among the different kinds of property subject to taxation by the act imposing the tax. Nor is it required to be apportioned among the States and Territories according to the amount or value or character of the taxable property in each. It is true that if an apportioned tax should be imposed upon sales of products or merchandise made at an exchange, board of trade, or other similar place, and everything else should be exempted from taxation, it would operate very unequally, because very few such sales might be made in some States and Territories, and a great many might be made in others; but this, while it may constitute a forcible argument against the wisdom or policy of such an act, would be no argument at all against its constitutionality. In the case of slaves, such an act as we have indicated would have entirely exempted the people from direct taxation in more than half the States, and yet slaves were included, without question, in every direct tax law enacted prior to the beginning of the civil war. The first direct tax law enacted imposed taxes upon dwelling-houses, lands and slaves; dwelling houses and lands were taxed upon a valuation or assessment, while slaves were taxed *per capita*. The general direct tax laws of 1813 and 1815, and the special act of 1815, which applied only to the District of Columbia, imposed the taxes on lands, building and slaves, but the act of 1861 omitted slaves. So far as we know it was never contended that a tax upon slaves, whether laid *per capita* or upon a valuation or assessment, was not a direct tax under the constitution.

Some confidence must be reposed in the judgment and discretion of the legislative department, and it is not to be presumed that it would attempt to impose the whole sum to be raised by a direct tax upon

a single kind of property unless it existed substantially to the same extent throughout the United States. However, the rule of apportionment based upon the census or enumeration is necessarily a rule of inequality in its operation upon the taxpayers and their property, and consequently the degree of inequality that might result in a particular case cannot be properly considered in determining whether that rule can or cannot be constitutionally applied. The questions of apportionment and equality, therefore, have no bearing upon the inquiry whether a particular tax is, or is not, direct. The result of such an inquiry must depend upon the tax itself, and its effect upon the property on which it is imposed. If it is so laid that, directly or indirectly, it becomes a charge upon the property itself so as to diminish its value in the hands of the owner to the extent of the tax, and is not merely a charge upon the individual for consuming or using the property, it is a direct tax.

If we are correct in our contention that this is not a tax on a privilege, and the Court should be of the opinion that it is not a tax on the sale and consequently equivalent to a tax on the property, then it is a duty, excise or impost on consumption, or on the business or occupation, or on the bill or memorandum which constitutes the evidence of the sale, and is subject to the constitutional rule of uniformity as well as to the general rule of uniformity and equality which modifies all power of taxation in this country. The constitutional requisition is not satisfied by a mere geographical uniformity in the sense that it is necessary only to apply the same rule or method of taxation in each State, no matter whether the taxation itself is uniform or not. It is not the rule that is required to be uniform, but it is the taxes, the charges upon the people and their property that must be uniform "throughout the United States." The language of the Constitution is, "but all duties, imposts and excises shall be uniform throughout the United States";

that is, anywhere in the United States—at every place in the United States. The language could not be made plainer than it is, and the grounds of the contention that duties, excises and imposts that are not uniformly laid are unconstitutional if the lack of uniformity does not exist in every State and Territory, but are strictly constitutional if the lack of uniformity does exist in every State and Territory are, to say the least, somewhat difficult to understand. This construction would sanction the grossest discriminations in taxation upon the same articles of consumption, the same privileges and occupations, and the same kind of documents, provided the same discriminations were made in each State and Territory.

The power to impose duties, excises and imposts extends to every part of the United States, and wherever the power extends, the rule prescribed for its exercise must extend also. This clause of the constitution has no reference to State lines or to political divisions or sub-divisions. Duties, excises and imposts are laid in the Territories and in the District of Columbia as well as in the States, and wherever laid the rule of uniformity applies and must be observed, or the act imposing them will be invalid. If imposed at all they must be imposed upon the same things or classes of things at every place within the jurisdiction of the United States, and the constitutional rule cannot be disregarded in the State of Illinois, simply because it is also disregarded in all the other States. To hold otherwise would be equivalent to the assertion that the people of the States in adopting the constitution had repudiated the principle of uniformity and equality among taxpayers and their property which had theretofore been everywhere recognized as an essential element in all forms of just taxation, and substituted in its place a new rule which required simply that the violations of the rule of uniformity and equality should be uniform in all the States of the Union. This great power of taxation was

granted reluctantly to the general government, and it would require very explicit language in the constitution to justify the conclusion that there had been granted along with it a power to exact unequal and unjust contributions from the people in any part of the country.

On the contrary, the object of this provision of the constitution evidently was to secure an equal distribution of the burdens imposed by that class of taxes upon the people and their property. This was the general purpose, but as there are many different kinds of taxable property and privileges and occupations in the country, and as all men do not own or use the same kind of property or possess the same kind of privileges, or follow the same occupations, the general rule of uniformity has to be so modified in its practical application as to require simply that the same rates shall be imposed upon the same things, or classes of things, no matter who owns or uses them or at what place in the United States they are owned or used. The rule does not require the imposition of the same duty, excise or impost upon a pound of tobacco that is imposed upon a pound of mixed flour, nor the same rate upon a deed for real estate as upon a check for the payment of money, but it does require that the same rate shall be imposed upon all tobacco of the same kind, upon all mixed flour of the same kind and upon all deeds and checks of the same kinds, wherever the property may be situated, or wherever the documents may be executed. If it does not require this much at least, it wholly fails to accomplish any part of the purpose for which it was intended, and is utterly worthless as a protection against unequal taxation.

Mr. Justice Field in his separate opinion in the case of Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., 429, correctly stated the meaning of the rule when he said: "The uniformity thus required is the uniformity throughout the United States of

the duty, impost or excise, levied. That is, the tax levied cannot be one sum upon an article at one place and a different sum upon the same article at another place. The duty received must be the same at all places throughout the United States, proportioned to the quantity of the article disposed of or the extent of the business done" (pp. 592, 593).

Granting that Congress may classify articles of consumption, occupations, &c., for purposes of taxation under the power to lay duties, excises and imposts, still the classification must not be arbitrary, but must be based upon some substantial difference between the things included in the several classes. Things of the same nature and use must be classed together and subject to the same rate. There must be such differences as "bear a just and proper relation to the attempted classification" Gulf, Colorado and Santa Fe Railway *vs.* Ellis, 165 U. S., 150; Bells Gap Railroad *vs.* Pennsylvania, 134 U. S., 232; Magoun *vs.* Illinois Trust and Savings Bank, 170, U. S., 283. Surely it cannot be said that the subjects of taxation can be properly classified according to the places where they were produced or sold, or where the occupation or business may be carried on, or where the document may be executed, unless the particular place where these things are done, actually affects the character or use of the thing taxed. The Court below correctly held that the tax or duty in controversy in these cases was imposed simply because the sales or agreements to sell were made at a particular place. It is not even intimated in the opinion that there is any difference between the products or merchandise sold by the petitioner and appellant on the board of trade, and products or merchandise of the same designation sold by other persons at other places free from taxation; but it is said that there are certain advantages or benefits enjoyed in making sales or agreements to sell at exchanges, &c., which do not generally exist elsewhere. This may be true; but, as we have al-

ready said, the same advantages and benefits are not enjoyed to an equal degree in all the other markets of the country, and we submit that if the differences between the markets in this respect constitute a sufficient reason for the imposition of different rates of taxation upon the articles sold in them, or upon the business conducted or on the documents used in them, the rule of uniformity is a delusion. Uniform markets would be necessary in order to secure uniform taxation.

This is not an impost on consumption, because such imposts are paid by the consumers, which is not the case here, as we have endeavored to show; but even if it be assumed that it is such an impost, it is not uniformly laid. Familiar instances of imposts on consumption are found in our statutes, imposing duties upon imported goods and internal revenue taxes upon distilled spirits, malt liquors, manufactured tobacco, cigars and other articles. These duties and excises are paid to the government in the first instance by the manufacturers or other producers, or by the importer, and they are imposed at uniform rates upon all articles of the same kind, wherever manufactured or produced or sold, or to whatever place they may be brought from abroad, and they are added to the price and paid by the last purchaser or consumer. It will not be disputed that the articles subject to taxation under the laws referred to are "products or merchandise," and as such are embraced in the act of June 23, 1898. Up to the time when that act took effect, those articles, or the consumers of those articles, were subject to only one duty or excise; but since that time, if the act is constitutional, they are subject not only to the tax imposed by the former laws, but to an additional tax every time they are sold at an exchange, board of trade, or other similar place. Some of them, therefore, will reach the consumer, if this is a tax on consumption, charged with only one tax, some with two, some with three, and so on, depending in each case upon the number of

times the article may have been sold at a particular kind of place or market. And as to all other articles of consumption, not subject to taxation under previous laws, each one of them must now reach the consumer burdened with a separate tax for each time it has been sold at one of the places described in the act; but if the article reaches the consumer without having at any time been sold at such a place, he is subject to no tax whatever. Is such an excise on consumption "uniform throughout the United States?" If a duty of fifty per cent. ad valorem were imposed on imported goods of a particular kind when consigned to a board of trade, or to a member of a board of trade, and a duty of only twenty-five per cent. ad valorem, or no duty at all, on all other goods of the same kind, would it be a uniform duty in the constitutional sense? We suppose it would be uniform in the geographical sense if taxpayers and their property are to be classified according to State lines, for it would be uniformly unequal in every State. In the case of excise taxation under the internal revenue laws, would it be constitutional to impose one rate upon tobacco, for instance, grown or manufactured at certain places, and a different rate upon the same article grown or manufactured elsewhere? In the case of United States *vs.* Singer, 82 U. S., 111, this Court said the excise was uniform because it was "assessed *equally* upon all manufacturers of spirits wherever they are." Undoubtedly the excise in question in that case was uniform, but unless we are correct in our contention here, it was not uniform for the reason given by the Court.

Even if this is a duty or excise on the privilege of being a member of an exchange, or board of trade, or other similar place, or on the privilege of transacting business at such places, that is, the privilege of enjoying the advantages and benefits which such places afford—it is not uniformly laid. All the members of such associations, those who buy and those who sell, possess equal privileges, but those

only are taxed who make sales of products or merchandise. The value of the privilege to buy at such places is as great as the value of the privilege to sell, and one is just as exclusive as the other; but neither the privilege to buy nor the actual use of that privilege is taxed under the act. The privilege to buy and sell bonds, stocks, bills of exchange and securities of all kinds is possessed and exercised by members of exchanges, boards of trade, and other similar places, to the same extent and in the same manner as the privilege to buy and sell products or merchandise, and it is fully as valuable; but it is not taxed. If the privilege is taxed at all, it must be taxed as a privilege, and, as such, it is an entire and undivisible thing. To divide it and subdivide it and classify its several parts, taxing those who use it for one purpose and not taxing those who use it for another purpose under exactly the same conditions, is certainly not a compliance with the rule of uniformity or equality as heretofore construed. Even, therefore, if such privileges are so different in their nature and use from the right to buy and sell at other places as to constitute a distinct class for the purposes of taxation, the act makes an unjust discrimination between persons and property of the same class, and this has always been condemned by the Courts. It make a discrimination between buyers and sellers of "products or merchandise" at the same place and under the same conditions, and it makes a discrimination between sellers at the same place and under the same conditions, the latter discrimination being based solely on the character of the commodities sold. These discriminations cannot be justified under the constitution upon the ground that it was the policy of the law to encourage and promote sales of bonds, stocks, &c., at exchanges, boards of trade and other similar places, and to discourage sales of products or merchandise at such places, for Congress cannot depart from the constitutional rule on any such ground. The rule prescribed is imperative and

must be obeyed, and when it is ascertained that it has not been complied with, no matter what may be the reason for its violation, the tax is invalid. In selecting the subjects for taxation, considerations of public policy are entitled to their proper influence, and particular kinds of property or privileges may be wholly exempt, but on the subjects selected for taxation the rates must be uniform according to the character of the things taxed; that is, things of the same kind must be taxed at the same rate. If a privilege is taxed, all who possess and use it at the same place and under the same conditions must be required to pay or the rule of uniformity is violated.

If this is not a tax on the sale or agreement to sell, as it purports to be, it is a stamp duty on documents, and as such is of course subject to the rule of uniformity, and what we have already said on that subject is as applicable to it as to the other subjects of taxation. We have endeavored to show that it is not a duty or excise on a privilege or an impost on consumption, and we do not think it will be contended that it is a duty on an occupation or business. Whether the tax or duty is imposed upon the document or upon something else, the question as to the power of Congress to require a party to a sale or agreement to sell personal property in the course of intra state commerce to make a written note or memorandum of the contract, when the law of the State permits it to be made in parol, and to punish him by fine and imprisonment for a failure to do so, is directly involved in both of these cases; and if the duty is imposed on the document only, the Court must also decide whether or not Congress has the power, under the circumstances stated, or indeed under any circumstances, to require the party who makes a sale to make a written note or memorandum of the transaction solely for the purpose of imposing a tax on it; or, in other words, whether Congress can, in the exercise of the taxing power, or

any other power, compel a citizen to create a thing in order that it may be taxed by the United States.

The first clause of Schedule A which imposes stamp duties on bonds, debentures, certificates, &c., provides that "in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed"; but the law prescribes no penalty whatever for a failure or refusal to make the note or memorandum required by this clause. The penalty is imposed only for a failure to pay the duty by affixing a proper stamp. But in the next clause, which is the one applicable to these cases, there is a penalty of five hundred dollars, or imprisonment for six months, or both, imposed upon every one "who in pursuance of such sale, agreement of sale, or agreement to sell, *delivers any such products or merchandise*, without a bill, memorandum, or other evidence thereof as herein required," and under this provision the appellant Nicol was prosecuted and convicted. The information upon which he was tried did not charge that he had delivered any products or merchandise without making and delivering a bill or memorandum, agreement or other evidence of the sale, but simply that he had *made a sale* at the Board of Trade "for immediate and present delivery," without making and delivering the required evidence of the transaction. The Court, however, held the information sufficient, and overruled a demurrer, a motion to quash and a motion to arrest the judgment. The information was clearly defective; it failed to charge any offense under the statute, but as this appeal is not prosecuted to reverse the judgment of conviction in the District Court, but for the purpose of reviewing the judgment of the Circuit Court refusing to discharge the prisoner on a writ of *habeas corpus*, we suppose the error indicated is not now material. The appellant has been convicted under an errone-

ous construction of the statute by the court in which he was tried, but if the statute itself is unconstitutional and void, the fact that it was erroneously construed cannot affect his right to relief in this proceeding.

The statute imposes a fine or imprisonment, or both, for consummating a sale of certain commodities made at any of the places specified, by delivering the things sold, without also making and delivering to the purchaser a bill, memorandum, or other evidence—that is, written evidence —of the transaction. It is the place where the sale is made, and not the place where the bill or memorandum is made, that determines whether or not the tax or duty shall be imposed, and this, we think, shows, as already argued, that it is the sale itself that is taxed, and that the other requirements are made in the statute merely to facilitate its collection.

That each State "has the right to regulate the transfer of property within its limits," is a proposition which cannot be disputed. Greene *vs.* Van Buskirk, 72 U. S., 307; 74 U. S., 139; Hervey *vs.* Rhode Island Locomotive Works, 93 U. S., 664. Whether this is a part of its police power, or belongs to some other class of governmental powers, is immaterial, for its existence is conceded, and from its very nature it must be plenary and exclusive. It is inconceivable that two different sovereignties can possess equal power to regulate and control the same thing at the same time and place.

In the case of New York *vs.* Milne, 11 Pet., 102, this Court said that "a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restricted by the constitution of the United States. That, by virtue of this, it is not only the right but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by

any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are *not* thus surrendered or restrained, and that, consequently, in relation to these the authority of the State is complete, unqualified and exclusive." And in the case of Gibbons *vs.* Ogden, 9 Wheat., 1, Chief Justice Marshall, speaking of inspection laws, said, "They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those with respect to turnpike roads, ferries, &c., are component parts of this mass. No general direct power over these subjects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislation of the Union can reach them, it must be for national purposes; it must be when the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." See also License Cases, 5 How., 504; Passenger Cases, 7 How., 283; License Tax Cases, 5 Wall., 470; Lane County *vs.* Oregon, 7 Wall., 71; Texas *vs.* White, 7 Wall., 564; Lehigh Valley Railroad Co. *vs.* Pennsylvania, 145 U. S., 192; Louisville N. R. & T. R. Co. *vs.* Mississippi, 133 U. S., 587; Budd *vs.* New York, 143 U. S., 517; Brass *vs.* North Dakota, 153 U. S., 391; Postal Teleg. Cable Co. *vs.* Charleston, 153 U. S., 692.

We cite these decisions not because authority or argument is now necessary to prove that the States

possess the exclusive power to regulate their own internal commerce by prescribing the manner and form in which contracts respecting that commerce shall be made, within their own limits, in order to transfer the title, but because in these well considered cases this Court has carefully defined the lines which separate the authority of the general government from the authority of the States over the subject of commerce generally. They firmly establish the principle that Congress cannot interfere in any manner, directly or indirectly, with the purely internal or domestic commerce of the States, unless it be necessary and proper to do so in order to effectively execute some power expressly delegated to that body by the constitution of the United States. It cannot wantonly and unnecessarily invade the domain of State legislation and prescribe rules and regulations in conflict with the rules and regulations prescribed by the State. This power belonged to the States primarily, and they have never parted with it except so far as its exclusive exercise by them in a particular case might prevent or obstruct the full exercise of some paramount authority conferred by the constitution upon the government of the United States.

We think associate counsel has conclusively shown that the clause of the statute under which the appellant was convicted, does interfere with and regulate, as far as it goes, the internal commerce of the States, and we do not propose to dwell on that part of the argument. It is plain that the assertion of a power in Congress to impose penalties upon a citizen for a failure or refusal to make a written contract or memorandum on the sale of personal property within a State, is founded upon the assumption that it has the power to require such a contract or memorandum to be made, and to declare the sale void if not so made. It is true that the act in question does not in terms declare an oral contract of sale void, but it makes it unlawful and

punishes the party for making it, or, to speak more correctly, it punishes him for delivering the property on a parol contract, which is the same thing, for the delivery is a necessary part of the sale. If this has been done in the exercise of a power conferred by the constitution of the United States, we do not see how any Court, State or Federal, could, without disregarding the well established rules of law, enforce a parol contract for the sale of products or merchandise at an exchange, board of trade or other similar place. If, on the other hand, the contract would not be legally void, still the act interferes with and obstructs the internal commerce of the States in the same manner and to the same extent that the legislation of various States interfered with and obstructed interstate commerce in numerous cases heretofore decided by this Court. It is a restraint upon that commerce; it requires something to be done in carrying it on which the law of the State does not require; and it not only requires this, but it imposes a punishment by fine and imprisonment upon the citizen engaged in that commerce for conducting it in strict accordance with the laws of the State where his business is transacted. It is scarcely necessary to suggest that, if this can be constitutionally done, Congress can, whenever it may consider it necessary and proper to do so in order to effectually execute its taxing power, or any other power expressly delegated, prescribe the form in which all contracts shall be made, and the manner in which all trade shall be conducted within the limits of every State. If the power exists to the extent claimed in these cases, we are unable to see where the limitations upon it are to be found. Congress can adopt any mode of collection it chooses, provided it does not violate some fundamental right of the citizen secured by the constitution, or infringe some exclusive right of a State, and if, when a particular mode has been adopted, every means which, in its judgment,

would facilitate the collection may also be adopted, there is plainly an end of all limitations upon the power of Congress to control the internal commerce of the States and the private property and domestic affairs of their people. According to this theory whatever is taxable in a State is controlable by Congressional legislation, even though such legislation may be inconsistent with the exercise of authority over the same subject which unquestionably belongs primarily to the State under our system of government. We do not question the proposition, that where a power has been conferred upon Congress either by express delegation or by fair implication from a power expressly delegated, it is paramount to the authority of the States over the subject to which the power relates; but the power delegated must itself relate to that subject. The implied or incidental power cannot be so extended as to embrace subjects of legislation to which the principal or expressly delegated power does not relate, and this rule of interpretation is especially applicable in a case where it is sought to use the implied or incidental power for the purpose of regulating or controlling a matter which, according to the theory and structure of the government, has been left to the control of the several States. A power not delegated is a power prohibited, and this would have been the true rule of construction even without the tenth amendment. Certainly the power to regulate the internal commerce of the States by prescribing the forms in which contracts for the sales of property within their limits shall be made, or otherwise, has been neither delegated to the United States nor prohibited to the States, and it is therefore expressly reserved to the States. But that reservation is subject to the general qualification resulting from the relations which the States bear to the government of the United States, that Congress may pass such laws as shall be necessary and proper for carrying into execution the powers delegated to it, and in doing so, may, to a certain extent, incidentally interfere with the internal com-

merce of the States. The question then is, whether Congress in the exercise of the power to lay and collect taxes, duties, imposts and excises, can regulate or control the internal commerce of the States, and if so, to what extent can it do so?

The power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, and the power to regulate the internal commerce of the States, are distinct powers, and the subjects to which they relate are distinct subjects. The power over one of these subjects is granted to Congress, and the power over the other is reserved to the States respectively. The power to lay and collect taxes, duties, imposts and excises is a distinct and substantive power, conferred for certain designated purposes—that is, to pay the debts and provide for the common defense and general welfare of the United States—and it has no connection with the power to regulate commerce in the States or elsewhere. In the language of Mr. Chief Justice Marshall, the power to regulate commerce, is "a great, substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them." McCullock *vs.* Maryland, 4 Wheat., 316. He was speaking of the power to regulate interstate and foreign commerce, but the power to regulate the internal commerce of the States is of the same nature, the only difference being that one belongs to the several States while the other belongs to the general Government. It is as exclusive in the one as it is in the other unless it shall become necessary and proper to interfere with it in the States, as an appropriate and plainly adapted means for the execution of some special power granted to Congress; and the implied or incidental power employed for this purpose must be plainly applicable to the particular granted power in connection with which it is exercised. The power to impose and collect taxes, duties, &c., is granted; but, does this carry with it the power

to require written memoranda to be made of sales and transfers of property within the limits of a State and to punish the seller by fine and imprisonment for not doing so, when the sale and transfer have no connection with interstate commerce? Can Congress determine finally and conclusively that the exercise of such a power is necessary and proper in a given case, and if so, can it also determine finally and conclusively the degree of necessity and propriety required to justify its exercise and the extent to which it shall be employed? If these questions are answered in the affirmative, we do not see that the constitution has left any line of demarcation between the reserved powers of the States and the granted powers of Congress, or any beneficial limitations upon the authority of that body to legislate upon all subjects affecting the trade and industry of the country. The object of the statute under consideration was to impose and collect certain taxes, duties, &c., and we admit that it was competent for Congress to provide for the use of all the usual and customary means for the accomplishment of that purpose, but the means employed must not only be plainly adapted to the end, but they must be consistent with all parts of the constitution and with the whole spirit of our political institutions.

It could not authorize the confiscation of the citizen's property or the imprisonment of his person without a judicial proceeding, or prohibit him from carrying on a lawful business within the limits of a State upon the ground that it would diminish the revenue to be derived from other sources, or that it would make the collection of the revenue more difficult; nor can it employ means in conflict with the constitutional authority of the State with any more propriety, or to any greater extent, than it can employ means in conflict with the constitutional rights of the citizen

In the late statute Congress has not seen fit to

confine itself to the usual means of securing the payment of the tax or duty, but has attempted to stretch its power beyond the limits heretofore assigned to it by any judicial authority, as far as we know. All that was necessary and proper to do, was to provide for the seizure of the thing sold if the tax was not paid, or, at the most, to provide for the imposition of a fine and imprisonment for a failure or refusal to pay the tax. Even the latter provision is unusual, but it is contained in the law, and the petitioner, Nichols, has been convicted under it. It is true that the punishment is imposed for a refusal to affix the stamp with intent to evade the provisions of the act, but we suppose that every one who refuses to pay a tax does so, legally speaking, with intent to evade the provisions of the law imposing it, and consequently the substance of the transaction is, that the petitioner has been fined and imprisoned for not paying the tax. But in the other case Congress has considered it "necessary and proper" to provide for the infliction of a fine and imprisonment for a failure or refusal to make a bill or memorandum of the sale or agreement, with intent to evade the provisions of the act, and to prohibit the delivery of the property sold until such bill or memorandum is also made and delivered.

We suppose that a party who has been fined and imprisoned under these unusual penal provisions has a right to ask a court to inquire whether they are necessary and proper provisions in a United States tax law, notwithstanding the fact that Congress has adjudged them to be so in this particular instance, but in no other, and therefore we propose to state briefly the grounds upon which it is claimed that they must be held invalid. Assuming that the tax or duty is not imposed on the document itself, the sole object of the provisions referred to must be to secure the payment of the tax or duty on the sale or agreement, or on the privilege, occupation or business, or on the

consumption of the product sold, and in all these cases it is evident that the making of a bill or memorandum prior to or at the time of the delivery of the goods sold, and the delivery of the bill or memorandum to *the buyer* of the goods, cannot be as effective in securing the payment of the tax or duty as a written report of the transaction to the official authorities with the requirement that the payment should be made in money or by affixing a stamp to the report. Of what value, as a means of securing payment, is a bill or memorandum delivered by the sellor to the producer? It is not required to be preserved, or recorded or reported to any revenue officer or other government official, and consequently the only practical effect of the requirement is to obstruct commerce within the State by punishing the sellor for delivering the thing sold without also at the same time delivering a bill or memorandum of the transaction. If a written report, under oath, had been required with a stamp affixed to it denoting the amount of the tax or duty, or if payment in money had been required based upon the amounts of the tranactions as shown by the report, the security of the government would have been greater, and the internal commerce of the States would not have been interfered with in the least degree. The sales and agreements would have been freely made and consummated by the delivery of the property, and there would have been less uncertainty concerning the collection of the tax or duty than there is under the method adopted. We concede that where Congress has a choice among means, all of which are clearly constitutional, it may adopt any one it prefers, and the courts will not attempt to control its action; but when, as in this case, the means adopted interfere with rights previously existing in the States and among their people, and are, therefore, of doubtful constitutionality at least, and there are other means entirely free from constitutional objections, and equally or more effective for

the accomplishment of the same purpose, it is the duty of the courts to interfere for the protection of the States and their citizens. In such a case there is no question as to the degree of the necessity or propriety upon which the validity of congressional legislation depends, because, in fact, there is no necessity or propriety whatever in adopting the one questionable means and rejecting the others. In the present statute we have a very suggestive illustration of the consequences that would follow an unqualified recognition of the rule that Congress must determine finally and conclusively what legislation is necessary and proper in the execution of its powers. We have already, in another connection, called attention to the clause of the statute which immediately precedes the one under consideration, and which imposes stamp duties on bonds, debentures, ertificates, &c., and requires that in certain cases a bill or memorandum shall be made, but does not provide for any punishment for a failure or refusal to make it, or for delivering the thing sold without making it. It appears, therefore, that Congress has in the same statute decided the same question in two different ways. In the case of bonds, debentures, &c., it has decided that it was not necessary and proper to compel the sellor to deliver a bill or memorandum before or at the time of delivering the thing sold in order to secure the payment of tax, and in the case of products or merchandise, it has decided that it was necessary and proper to do so, although the opportunities for evading the payment of the tax or duty on the sales and transfers of bonds, certificates, &c., which are easily concealed and pass by delivery from hand to hand, are immeasurably greater than in the case of sales of products or merchandise. Undoubtedly if Congress possessed the power in one case, it possessed it in both, and the fact that it was employed in one and not in the other shows what unjust and oppressive discriminations may be made between different classes

of property and occupations, if that body is to have not only the right to determine when and how it will use its powers, but also the exclusive right to determine the extent of its powers. The man who sells bonds, certificates, &c., at an exchange or other similar place in Chicago, cannot be fined or imprisoned for failing to make a bill or memorandum, although the law requires him to do so; but the man who sells produce or merchandise at the same place and in the same way can be—and has been—fined and imprisoned for a failure to comply with the same requirement.

If this is a tax on the document, the provision requiring a bill or memorandum to be made, and imposing a punishment for a failure to make it, is none the less a regulation of the internal commerce of the State, and it is subject to all the objections we have urged against it on that ground; and it is subject to the additional objection that it is an attempt by Congress to compel the people to create a thing merely for the purpose of taxing it. In the License Cases, this Court decided that the power of taxation reaches only existing things and that Congress could not authorize a trade or business within a State in order to tax it; and in United States *vs.* DeWitt, 75 U. S., 41, it decided in effect that Congress had no power to prohibit the manufacture or sale of a particular article within the limits of a State in order to increase the manufacture or sale of another article of the same general character from which revenue was obtained by taxation. We suppose it will be conceded that if Congress actually possesses the power under the constitution of the United States to prohibit or to require a thing to be done within the limits of a State, the fact that it would interfere with the exercise of the police power of the State is of no consequence whatever, for if the power of Congress over the subject is comferred by the constitution it is supreme over all the powers of the State—the police power as well as others. If the

power to tax necessarily and properly includes the power to compel the people to create things to be taxed, it makes no difference whether such legislation interferes with the police powers of the States or with their power to prescribe the forms of contracts and regulate trade and commerce within their own limits. The laws of the State of Illinois allow contracts for the sale of personal property in the State to be made in parole, but Congress has declared in the act under consideration that if they are made in parole and the property sold is delivered to the purchaser without also delivering a writing, the form of which is prescribed in the statute, the citizen shall be fined or imprisoned, or both; and this is done, if the tax is on the document, solely for the purpose of creating something to tax. This is certainly extending the power of taxation, which was already sufficiently ample for all emergencies, far beyond its legitimate scope and we cannot believe it will be sanctioned by the Court. It has often been judicially declared that the power to tax is the power to destroy, but the Court is now asked to declare, for the first time, that it is also a power to create.

In Weston *vs.* The City Council of Charleston, 2 Pet., 449, the Court said: "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits"; and in many other cases the unlimited extent of this power, whether it is vested in the general government or in the States, has been recognized. In view of these decisions, it is not going too far to say that if the clause of the statute under which these parties have been convicted is constitutional, it is clearly within the power of Congress, by the use of its taxing power, to destroy any trade or industry in the country against which a temporary popular clamor may be raised, however useful or necessary such trade or industry may be, or however solicitous the State in which it is carried on may be to foster and promote

it. In the present case the discriminating tax or duty imposed upon products or merchandise, or upon their sale at particular places, is sufficient in a great many instances to determine the question of profit or loss on the transaction. Competition is so severe, and the margin of profit in legitimate trade is so small that a fractional percentage upon the price of an article often turns the scale one way or the other, and consequently a discrimination in taxation which, in other times, might have been too insignificant in its effects to justify the condemnation of the act making it, will now destroy the value of the property or business against which the discrimination is directed. Whatever is of common knowledge is judicially known to the Court, and, therefore, it was not necessary to introduce evidence on the trials to prove the injurious effects of this statute upon methods of doing business which the State of Illinois and many other States have expressly recognized and encouraged by their laws and public policy.

We respectfully ask a reversal in both cases.

J. G. CARLISLE
For Appellant and Petitioner.

HENRY S. ROBBINS,
Of Counsel.